Supreme Court, U.S.
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No.

In the
Supreme Court
of the
United States

OCTOBER TERM, 1994

JAMES J. EDER,

Petitioner,

versus

ITT CORPORATION, ET AL.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, on summary judgment motion by defendants, plaintiff-respondent in an age discrimination case is entitled to a jury trial when plaintiff's evidence, viewed in light most favorable to him, meets all of McDonnell Douglas criteria, and all of the evidence of plaintiff and defendants is in direct conflict as to the reason(s) for terminating plaintiff.

2. Whether the lower court, in granting summary judgment to defendants, failed to view the facts presented by plaintiff in a light most favorable to him as the nonmoving party as required by the Federal Rules; and exceeded its authority when it decided matters of fact that should have been decided by a jury.

3. Whether the lower court misapplied the McDonnell Douglas standard in an age discrimination case by not submitting

matters related to the fourth element and to pretext to a jury.

4. Whether the lower court, in conflict with at least two circuit courts, erred when it limited an age discrimination plaintiff's discovery to 30 interrogatories and 30 requests for production.

5. Whether an employee with 25 years of service who had turned down other job opportunities and relocated because of promises he would be "retained to retirement" alleges sufficient facts for a jury trial.

LIST OF ALL PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioner, James J Eder, and the following defendants, all part of ITT Corporation, the parent company, and respondents to this petition (listed as they appeared in the original style of the case, said style later reduced to "ITT CORPORATION, et al." in the interest of brevity):

ITT CORPORATION

SERVE: CT Corporation Systems
1633 Broadway
New York, New York 10019, and

SERVE: G. Carr, Esquire
1330 Avenue of the Americas
New York, NY 10019-5490

ITT DEFENSE INC., a Delaware Corporation

SERVE: Andrew DeCicco, Esquire

1000 Wilson Blvd.

Arlington, Virginia 22202

ITT ELECTRO OPTICAL PRODUCTS DIVISION

SERVE: Andrew DeCicco, Esquire

7635 Plantation Road

Roanoke, VA 24019

ITT CORPORATION

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10 S. Jefferson Street

Roanoke, Virginia 24011

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James J. Eder, requests that a writ of certiorari issue to review the judgment and opinion of the United States District Court for the Western District of Virginia, Roanoke, Virginia Division, entered on September 13, 1993, granting respondents' motion for summary judgment, and of the United States Court of Appeals for the Fourth Circuit entered on June 10, 1994, which upheld the district court's ruling.

OPINIONS BELOW

The opinion of the court of appeals is unpublished and contained in Appendix A1 attached hereto. The opinion of the district court is included in Appendix A2, attached hereto.

JURISDICTION

The opinion of the court of appeals (Pet. App. page A1) merely stated that petitioner's appeal was found to be "*without merit*" and affirmed the district court's grant of respondent, ITT's motion for summary judgment; it was entered on June 10, 1994. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Count #1 of the captioned case involved violation of the Federal Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. This Federal law is contained in Appendix B1, attached hereto.

Count #2 of the captioned case involved breach of contract, with the district court applying the laws of contract of the State of Virginia to the matters in question, to wit: "Virginia has not deviated from the common-law

doctrine of employment at will ..." Bowman v. State Bank of Keysville, 331 S.E. 2d 797, 800 (Va. 1985); and "where no specific time is fixed for the duration of the employment, there is a rebuttable presumption that the hiring is terminable at will." Miller v. Sevamp, Inc. 362 SE2d 915, 917 (Va. 1987). (But, Plaintiff may overcome this presumption by showing promises or statements made by ITT-EOPD amounting to additional consideration for his services).

STATEMENT OF THE CASE

Background.

The case is one of age discrimination in violation of the Federal Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 621 et seq., as amended, with a pendant count of

breach of contract[1]. The complaint was filed on June 11, 1991.

Petitioner was an employee of respondent, ITT, for over thirty-three years, receiving continuous promotions during this time, as well as numerous commendations from ITT Executives and high ranking U.S. Military/Department of Defense customers of ITT. His fields of expertise include Sales, Advertising, Logistics Engineering and Management, Program Management, Office Automation and Customer Support. He published 10 articles in professional journals, and holds two copyrights related to computer programs.

His employment was terminated on May 18, 1990, long before the defense

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[1] An earlier Count #3, public policy tort, was dismissed by the court below on December 19, 1991.

industry was beset by the economic problems of recent years, and one month after receipt by respondent of a new $300,000,000.00 contract to which award petitioner contributed significantly.

Petitioner was fifty-eight years of age at the time of his termination. He was unable to gain new employment despite over 3,000 applications throughout the U.S., even though he had reduced his salary requirements to approximately half of his last ITT salary, and offered to take any new positions without Benefits. The fact is simply that, from that day to this, no one wishes to newly hire a 58 year old at any salary.

The Age Discrimination Count:

Respondent laid off petitioner after one and one half years of gradual delegation of his work assignments to and cross-training of three younger, non-

protected personnel who were assigned to the same 22-person department as petitioner (the Business Development Department). Upon petitioner's termination, all of his work/duties were turned over to these three younger, non-protected employees, who were earning about half the salary of petitioner. To this day younger personnel that were given petitioner's duties are still carrying out the duties that had been assigned to petitioner prior to his termination[2]. Moreover, after petitioner's termination, respondent continued to hire new and younger employees in the same 22-person Business Development Department from which

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[2] Two of the three -35 year olds given petitioner's work are still at ITT to this day and still performing petitioner's work; a third individual was terminated by ITT for poor performance.

petitioner was terminated for duties that petitioner was qualified to perform[3].

Respondents' official reason given in writing for terminating petitioner was "*reduction in force due to curtailment of the Generation II product line*" - a product line petitioner was not assigned to or worked on[4]. Later, respondent began changing its official reason for terminating petitioner, alleging performance and various other reasons.

Count #1 of petitioner's lawsuit named his immediate superior in the 22-person department in which he worked, Mr.

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[3] One position was in customer support; two positions were in program management. Petitioner had considerable experience in both fields.

[4] Respondent claims that "salaried employees" ... "generally do not perform work relating only to specific product lines". Yet, petitioner's counter-affidavit attached to his memorandum in opposition, at page 1, showed differently.

R. Williams - a corporate officer of ITT, as the individual who implemented the discriminatory acts. Petitioner's complaint requested he be reinstated with the company. The matters in the complaint were able to be set forth in considerable detail simply because on March 31, 1989, Williams unthinkingly revealed to petitioner his (Williams') plan to redistribute petitioner's work to younger personnel within Williams' department and that this was, according to Williams: "*political*" and "*decreed by corporate*". Williams' plan to redistribute petitioner's work to younger employees was corroborated by two director-level officials of ITT (named as witnesses for plaintiff)[5]. Because of

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[5] One director was assigned to ITT's Roanoke, Virginia plant; the other was assigned to ITT's Headquarters in Arlington, Virginia.

Williams' unintended revelation of his plans to redistribute petitioner's work, petitioner was able to obtain proof of hundreds of subsequent discriminatory actions taken by Williams as he implemented these stated plans. This evidence is in the form of memoranda, records, and notes, some 400 evidentiary exhibits in all, and identification of various witnesses who could attest to the discriminatory actions as they occurred[6]. The exhibits, together with his witnesses and affidavits, are the essential basis of his lawsuit[7]. Copies of said exhibits

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[6] Respondents/defendants referred to this as "hoarding"; petitioner, under the circumstances aforesaid felt his actions were prudent.

[7] The records proved all of the McDonnell Douglas elements, showing when, where and how petitioner's work was given to 3 younger personnel and their more favorable treatment; evidence of pretext by respondent (false letter of termination; false accusation of

were provided to defendants on or about March 23, 1993 as part of the discovery program, with a record of transmittal given to the district court.

The records show that in May 1990, when respondent felt reasonably confident that the three aforesaid younger personnel could completely take over petitioner's work, and coincidentally had a reason develop that could be used to mask the real reason for petitioner's termination (curtailment of a product), respondent terminated petitioner. Respondent in a formal letter of termination to petitioner stated that his termination was part of a reduction in force resulting from "*curtailment of its Generation II* [night vision goggle]

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misconduct; false degradation of petitioner's performance; hiring of new personnel after petitioner's termination).

product line". This reason was obviously false, simply because petitioner did not work on, nor was assigned to the curtailed product line. This was the sole reason given to petitioner for his termination[8]. Numerous facts of the case demonstrate the obvious pretextual nature of the reason given to petitioner for his termination. Among other disparities discussed below, is the fact that two of the three younger individuals that were given petitioner's work had a significant number of work assignments relating to the curtailed Generation II product line, yet they were retained and plaintiff was terminated.

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[8] Contrary to allegations of respondent, petitioner did not complain of the -200-person reduction in force. It was simply not the subject of this lawsuit, other than its role as to mask the real reasons for petitioner's termination.

Another is that respondent was later to change the reason it gave petitioner for his termination, alleging first, less than optimal performance[9], then misconduct[10], and/or various combinations of these "reasons" depending upon the current circumstance(s) being addressed.

Details of the aforesaid discriminatory sequence of events, and numerous evidentiary exhibits were included both in petitioner's memorandum in opposition to respondents' motion for summary judgment and in petitioner's

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[9] The terms "standard", "marginal", "adequate", "not bad" and even "superior" were all used in various ITT affidavits to describe petitioner's performance; the district court, at least apparently seeing through this sham, ruled that performance was not an issue.

[10] The misconduct allegation was so obviously designed to falsely tarnish petitioner's character in a desperate attempt to "win" the case, that the district court never even commented on it.

appeal brief. A summary of this chronology, with included evidentiary exhibits, is contained in appendix C1 attached hereto[11]. A summary of Petitioner's Counter-Affidavit that responds to and refutes each of respondents' allegations is contained in Appendix C4, attached hereto.

The Contract Count:

The second count of the lawsuit charged respondent with breach of contract. The basis for this was as follows: In 1982, at a time when the ITT Roanoke plant desperately needed respondent's skills, to attract him to the ITT Roanoke plant, respondent made

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[11] All copies of, or quotations from, certain evidentiary exhibits, references to other evidentiary exhibits and to his affidavits are exactly as contained in petitioner's memorandum in opposition to respondents' motion for summary judgment and in petitioner's appeal brief.

specific promises to petitioner that he could work at ITT's Roanoke plant "*until you retire*". In return for said promises, petitioner moved his family from, and left other members of his family and friends in, New Jersey, turned down an employment offer as Director of Automation for McDonnell Douglas in St. Louis, Mo., and moved to Roanoke, Virginia. Said promises were renewed on three occasions in Roanoke.

But respondent then reneged on said promises and petitioner was damaged when respondent without cause terminated him breaching their contractual arrangements. This, then, was the basis for the contract breach count of the lawsuit.

Flawed Discovery Program:

During the course of his lawsuit respondent experienced great difficulty in gaining responses to his discovery

program. For nearly two years after filing his lawsuit, starting with respondents' first replies to the complaint in 1991, petitioner experienced one delay after another in respondent's replies to his discovery. Each "reply", once finally obtained, contained exceptions, exclusions, refusals to answer and/or evasive answers.

Despite two motions to compel filed in accordance with the Federal Rules of Civil Procedure and on the basis of current age discrimination case-law designed to overcome this type of classic "large corporation" counter-attack, respondent never did comply in good faith with the Federal Rules of Civil Procedure. Nor did the lower court require respondent to comply. On the contrary, the district court limited petitioner-employee to 30 interrogatories

and requests for production, contrary to current case-law that favors a liberal discovery program for discrimination plaintiffs[12].

The Proceedings Below.

On April 20, 1993, respondent, ITT, and petitioner both filed Motions for Summary Judgment with supporting briefs[13]. Petitioner filed a Memorandum of Objection to Defendants' Motion on or about August 5, 1993. [Petitioner's reply to the April, 1993 motion was delayed because on May 15, 1994 he suffered a

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[12] Courts have typically allowed liberal discovery for out-of-work plaintiff-employees at a disadvantage opposing large corporate defendants with unlimited resources, who can afford to simply "outlast" the employee.

[13] Petitioner's grounds were that he met all of the McDonnell Douglas criteria; that defendant was estopped from changing its reason for terminating plaintiff; said change of reason by defendant (as well as other factors) clearly indicated pretext.

heart attack and subsequently required a triple bypass to eliminate four arterial blockages]. Petitioner's Memorandum contained four supporting affidavits and evidentiary exhibits that systematically refuted and categorically denied each and every one of ITT's allegations, and provided petitioner's factual description of each event and action that supported his charges of discrimination and breach of contract.

Both the respondents' original written reason and reasons he adopted later explaining petitioner's termination were refuted by petitioner in great detail by petitioner's evidentiary exhibits[14].

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[14] Petitioner's evidentiary exhibits, nearly 400 in all, were supplied to respondent and identified to the district court as part of the discovery program in the first quarter of 1993.

Moreover, petitioner's evidentiary exhibits, affidavits, and witnesses, in attesting to the real, discriminatory reasons for his termination, clearly established the four McDonnell Douglas criteria aspects of his case, as well as the pretextual nature of respondents' actions. In the matter of the age discrimination Count #1, one hundred and twelve (112) exhibits showed the willful, pretextual nature of respondents' discriminatory acts; two hundred and one (201) exhibits showed petitioner's excellent performance for respondent during his tenure with the company; sixty-six (66) exhibits showed respondent's redistribution of petitioner's work to and other more favorable treatment of the three named -35 year olds; In the matter of the contract count #2, nineteen (19) exhibits

showed promises of job security from respondent to petitioner in return for petitioner's move to and staying on at Roanoke, Virginia and other items of consideration. Other exhibits were added and submitted to respondent and to the district court, for example to show that an Administrative Practice alleged by respondent to be applicable to "employment-at-will" was, in reality, not applicable, nor ever distributed to petitioner, but only to executives at ITT.

Respondents' vacillations in its reason(s) for terminating petitioner, that started after receipt of the aforesaid evidentiary exhibits, further corroborated petitioner's original and continuing allegations of pretext.

After briefs had been filed in behalf of the parties, the district

court, in a Hearing held on August 17, 1993, granted Summary Judgment to ITT for Count #2 (breach of contract) **and docketed Count #1 (age discrimination) for trial on March 1, 2, 3 and 4, 1994.**

However, apparently changing its sentiments between August 17, 1993 and September 13, 1993, the district court, in a Memorandum Opinion dated September 13, 1993, granted Summary Judgment to ITT as to **both** counts and removed the case from its docket.

In its written opinion, the district court accepted virtually all of ITT's alleged facts over petitioner's clearly documented categoric denials of said facts; it ignored petitioner's proof of the **true facts**, well-supported by affidavits, specific evidentiary exhibits, references to some additional four hundred (400) evidentiary exhibits,

and a cadre of witnesses. The court below had already been informed of all of this by virtue of the discovery program[15]. The district court never once referred to petitioner's documentation in opposition. Indeed, there was no indication that the district court even read petitioner's opposing documentation, much less viewed said affidavits and evidentiary exhibits in a light most favorable to petitioner as the nonmoving party as required by the Federal Rules. In fact, the district court used ITT's deliberately false interpretation of petitioner's memorandum and attached

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[15] The district court does not accept copies of discovery submissions, presumably to minimize its files. Thus, while the court did not have all the evidence at its disposal, it had certain exhibits submitted by petitioner that more than adequately supported his arguments, and refuted ITT's. The court was advised that hundreds of exhibits remained available to it should it require them.

affidavits and evidentiary exhibits. For example, the district court under Section II, Analysis, stated:

"In terms of indirect evidence, plaintiff appears to rely on four facts: (1) he was the only person in his department that was laid off, (2) some of his job responsibilities were given to younger employees, (3) two fellow employees made comments referring to his age, and (4) he was not given another job available at the time of his layoff. The court finds these facts are not "of sufficient probative force to reflect a genuine issue of material fact."

The district court erroneously stated petitioner alleged **some** of his job responsibilities were given to younger employees, when in realty, petitioner maintains **all** of his duties were given to three younger employees and has

evidentiary exhibits and witnesses to support this; the district court puts great weight on petitioner's allegations that ITT Personnel employees and his immediate superior made comments about his age; yet on page 27 of petitioner's appeal brief he stated: "*This allegation was made in Eder's June 11, 1991 complaint as a corollary issue intending to show that age of older employees was a "negative" in some minds at ITT. It was never considered a major issue or crucial to Eder's case. Eder acknowledged in deposition that he thought at least some of the statements may have been made in jest or "friendly banter", but friendly or not, said statements tend to define the age-negative mentality of two people in the company with critical positions as to Eder's career - his superior and a*

personnel department manager; he states, however, that neither his complaint, nor any subsequent document has ever indicated this to be a crucial issue to his case.". Thus, as stated in the appeal brief, here again the Court Below focused on an issue irrelevant to the essential elements of Eder's case. In the district court's statement that "*he was not given another job available at the time of his layoff*", the district court ignored as stated in petitioner's appeal brief, that respondent passed petitioner over for **three** [not **one**] position[s] that petitioner was qualified to perform.

Thus, despite the fact that petitioner's memorandum in opposition and supporting documentation far exceeded the nonmoving party's requirements as defined Federal rules of Civil Procedure, Rule

56(e), clearly stating his positions regarding each element of his case, the district court ignored these clearly stated positions and supporting evidentiary exhibits in favor of respondent ITT. Some of these oversights are detailed following:

I. The District Court's Written Opinion

Inspection of the district court's written opinion of September, 1993 as to ITT's motion for summary judgment, clearly shows these omissions. Key elements of the district court's opinion upon which it based its judgment are described below and full text of the district court's opinion is contained in Appendix A2, attached hereto:

The district court first stated its premises for judgment [page A2-6]:

> *"In this case, the defendants bear the initial burden of*

pointing to the absence of a genuine issue of material fact." Temkin v. Frederick County Comm'rs, *945 F2d 716, 718 (4th Cir. 1991), cert. denied, 112 S. Ct. 1172 (1992), citing* Celotex Corp. v. Catrett, *477 U.S. 317, 322 (1986). "If the defendant demonstrates the absence of a genuine issue of material fact, the burden then shifts to the nonmoving party to come forward with facts sufficient to create a triable issue of fact."* Id. *at 718-19, citing* Anderson v. Liberty Lobby, Inc. *477 U.S. 242, 247-48 (1986).*

"There are two ways for the plaintiff to overcome the defendants' motion for summary

judgment: (1) produce direct or indirect evidence of discriminatory intent or (2) satisfy the test enunciated in McDonnell Douglas Corp. v. Green, *411 U.S. 792 (1973),* Id."

The district court then went on to base its opinion of September, 1993 (App. A2) upon the following principal components [the court's opinions are summarized in **BOLD**, then shown indented and separated by small letters; petitioner's comments regarding these are provided just below each of the court's principal opinions]:

II. District Court Holds Petitioner to McDonnell Douglas Fourth Element; then Ignores Petitioner's Evidentiary Exhibits and Affidavits in Favor of ITT's Affidavits

a) The court while stating at Appendix page A2-8, that "*it is*

undisputed that plaintiff satisfies the first three elements of the McDonnell Douglas Corp. v. Green, supra, *scheme*" [he was in the protected class; he was terminated; his performance met ITT's legitimate expectations] (Appeal App. 330), plaintiff may satisfy the fourth element by showing "*that persons outside the protected class were retained in the same position or that there was some other evidence indicating that the employer did not treat age neutrally in deciding to dismiss the plaintiff.*" The court went on to state that plaintiff did not satisfy the fourth element of McDonnell

Douglas Corp. v. Green, supra. It stated that it believed ITT's version that **six** (instead of three) different people took over plaintiff's duties, three over the age of 40 and three under the age of 40 (in its discovery replies, ITT had conceded that the **three** originally-named non-protected individuals **had** received petitioner's work as petitioner has maintained from inception of his action, but ITT later identified three "older" employees who it alleged also received plaintiff's work). Thus, ITT maintained it required **six** people to take over plaintiff's work. (while at the same time, incredibly,

labeling him a "marginal performer").

But, the record shows plaintiff had consistently and unwaveringly maintained, and submitted to the district court, affidavits and evidentiary exhibits, showing that **only** the **three** named -35 year olds had been given his work; that this work reassignment had been started in 1989 when petitioner was unintentionally advised by his immediate superior (Williams) that redistribution of his work was to commence; that each of the three named individuals were also managers in Williams' department; that as admitted by ITT, one individual received plaintiff's work and position in Marketing Communications (Advertising and P/R); another received his work and position in Logistics Engineering and Business Services; still another received

his work and position in Commercial Sales. Moreover, plaintiff's affidavits clearly stated with substantiating examples that the three **older** employees whom ITT (later) alleged also received his work were not competent to perform said work. Petitioner also stated he had witnesses who would attest to the aforesaid at trial. The district court ignored petitioner's evidence and took the place of a jury in deciding the questions of fact between petitioner and respondents (ie; three younger people vs. six people, three younger and three older[16]).

III. District Court Maintains that Petitioner's Position was Eliminated, Ignoring Petitioner's Evidence that the Position Alleged by ITT Never Existed

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[16] One of the three older personnel whom ITT maintained also received petitioner's work, never even joined Williams' department until months after petitioner's termination.

b) The district court also stated, as part of its reason for concluding plaintiff had not met the fourth element of McDonnell Douglas Corp. v. Green, supra, at Appendix page A2-9, that plaintiff's position was eliminated.

But plaintiff has always maintained as did his affidavits and evidentiary exhibits contained in his memorandum in opposition filed with the district court, as would his witnesses, that his so called "position" was just a title. He even filed an evidentiary exhibit containing instructions from his superior (Williams) that he was an "individual performer", clearly indicating that his position was just a title. Moreover, petitioner's affidavit stated that at ITT it was a normal occurrence to find

personnel who, while carrying a title connoting head of a staff of personnel, in reality were performing as individuals, as was plaintiff. The affidavit named over ten such individuals. Thus, plaintiff's documentation filed with the district court, as well as his witnesses, would show at trial that his so-called "position" was just a title, and elimination of a title while retaining and redistributing the actual work to younger employees is not only discriminatory, but a sham as well. Petitioner also stated in his opposing documentation that certainly when an employer redistributes an older employee's work among younger personnel, he would logically eliminate the title of the employee he did away with to preclude any suspicion of discrimination.

IV. District Court Claims that Petitioner Never Showed a Pretextual Reason for his Discharge, When Petitioner Had Submitted an Overwhelming Amount of Evidence of Pretext

c) The district court proffered a third reason for stating plaintiff did not meet the McDonnell Douglas Corp. v. Green, supra, fourth element and stated at Appendix A2-14 (enigmatically, since petitioner had brought forth evidence time and time again of respondents' pretext): "*even if plaintiff could satisfy the fourth element, plaintiff could not show that ... the reasons for discharge were pretextual or unworthy of credence*". The court also stated it believed ITT's proffered statistics that (ITT maintained) clearly showed

it did not discriminate in its reduction in force.

As to the reduction in force, the court ignored the fact that petitioner never once maintained during the course of the lawsuit or the appeal, that the reduction in force had anything to do with the discriminatory acts taken against him[17]. Petitioner has always maintained that the reduction in force, although required because the company ceased producing an obsolete product line, had nothing to do with petitioner and merely provided a convenient excuse under which plaintiff could be terminated. Petitioner always maintained

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[17] Petitioner's affidavits did point out some flaws in the "statistics" used by ITT to indicate its reduction in force was nondiscriminatory. For example, salaries of older personnel who were laid off were higher than salaries of older personnel not laid off and this sort of "selectivity" is also discriminatory.

that the discriminatory action took place within the confines of the 22-person department in which he worked; that his immediate superior (Williams), a corporate officer acting on behalf of ITT, was responsible for said actions; and that the three -35 year olds who were given his work were employed only within this department.

As to pretext, the formal letter of termination he was given by ITT (filed by petitioner with the district court) stating the he was being terminated because of the reduction in force was a lie because he never worked on the product line that was being curtailed. Petitioner's affidavit clearly stated this. ITT later changed this reason, lending still further support to plaintiff's already strong allegations of pretext, notwithstanding the district

court's disregard of these in its opinion.

Thus, in the most critical elements of Count #1, as shown in the preceding items I through IV, above, the district court ignored petitioner's affidavits, and evidentiary exhibits, opting to believe ITT's statements instead, statements that ITT took over two years to concoct and that were incredible on their face. In deciding whom to believe, the district court put itself in place of a jury in direct conflict with the Federal Rules, and gave the benefit of the doubt to the wrong party.

V. District Court Ignored Other Evidence Proving Pretext That Would Have Also Mandated Trial

d) In still another oversight, the district court ignored other allegations of pretext, well-supported by affidavits

and exhibits, even though the district court acknowledged that pretext would overcome the fourth element of McDonnell Douglas Corp. v. Green, supra, and would qualify the case for trial.

For example, in his memorandum in opposition, plaintiff stated:

"One ITT action indicative of pretext is based upon ITT's written notice of termination to Eder that stated his termination was due to curtailment of a product line that Eder never was assigned to and had little to do with.

In 1992, ITT started to change its official reason for Eder's termination from 'Curtailment of its Generation II Product', to 'Performance'. Eder filed a Motion for Summary Judgment on the ground that ITT was estopped from changing its

official reason and doing so was indicative of pretext. Graeffenheim v. Pabst Brewing Co., 827 F.2d 13."

Eder's Motion was rejected by the Court Below without comment on the proffered case-law."

"Evidence of pretext is also indicated by the fact that Eder's superior informed him in March, 1989 that one of the three younger employees [L. Holder] had been designated by corporate to receive his advertising and public relations assignments, did receive said assignments, and this was admitted by ITT. Eder's Evidentiary Exhibit # 164, and others that were included in the affidavit attached to his memorandum in opposition specifically recounted his superior's statements regarding reassignment of his duties to the ~35 year old individual, summarized still

other exhibits that showed his work being redistributed to the other two -35 year old individuals, and identified witnesses to these discriminatory actions. These are shown in appendix C3, attached hereto."

VI. District Court Remains Silent on Petitioner's Restricted Discovery Program

As to the district court's restriction of his discovery program, petitioner stated at page 43 of his appeal brief:

> *"Eder filed two Motions to Compel Discovery [the first, docket entry No. 8, October 30, 1991; the second, Docket entry No. 13, September 3, 1992]. In addition, he made repeated written letter requests attempting to negotiate some responses to discovery. Eder's*

Motions were denied by the District Court, none of the letters attempting to gain specificity produced adequate discovery, and the Court limited Eder to 30 interrogatories and 30 requests for production (Docket entry No. 11, May 15, 1992). ITT has consistently evaded replying with specificity to key interrogatories and requests for production. For example, in response to Eder's request as to whether ITT knew in 1989 it would be going out of business with respect to its Generation II product, ITT responded that the question "would not likely lead to admissible evidence". Despite

these repeated attempts to gain responses to his discovery, the Court Below denied Eder's Motions to Compel Discovery filed on October 30, 1991 [Docket No. 8], and September 3, 1992 [Docket No. 13]."

VII. District Court, as to Breach of Contract Count, Finds Petitioner to be an at Will Employee Based Upon an Undistributed and Inapplicable ITT Executive Administrative Practice

As to plaintiff's allegation of breach of contract, the district court at page 10 of its opinion, Appendix A2-16, found that "*plaintiff was an at-will employee and must grant defendants' Motion for Summary Judgment as to count 2.*" The court, as the primary basis for its opinion, used ITT affidavits and an ITT "Administrative Practice" that advised **only** its executive personnel, and **not** its mid-management or lower level

employees that it was an "at-will" employer.

But in so holding, the district court ignored plaintiff's affidavit [page 35] and evidentiary exhibits contained in his memorandum in opposition that the "Administrative Practice" was never distributed to plaintiff, its distribution expressly intended only for ITT executives, which plaintiff was not.

Thus, here again, the district court opted to take ITT's "word" in support of its motion, completely ignoring plaintiff's motion in opposition and the affidavits and evidentiary exhibits contained therein, contrary to the Federal rules, the weight of authority, and this esteemed Court's prior opinions.

VIII. Fourth Circuit Court of Appeals Rules in Favor of District Court; does Not Issue an Opinion

Petitioner on appeal sought a

reversal to said final order. He asked the appeals court to reverse the district court's ruling and to set Counts #1 and #2 of his case over for trial on the grounds that each and every allegation of respondent in support of its motion for summary judgment was a genuine dispute of fact(s) between the parties, and the court not only failed to view these facts in a light most favorable to plaintiff/petitioner as the nonmoving party as required by the Federal Rules of Civil Procedure, Rule 56(e), but acted as a jury in deciding whose fact to believe. Indeed, the lower court's stated opinions would indicate it never even read petitioner's memorandum in opposition and supporting documentation.

In addition to the petitioner's complaint about the district court's failure to compel discovery, a portion of

petitioner's appeal complained that he was unduly restricted in the number of interrogatories and requests for production allowed him by the district court. Petitioner, on appeal therefore, requested that the lower court order ITT to comply with discovery, allow him additional interrogatories and requests for production, and pointed out that **since his discovery program was incomplete, this too should have precluded the court's granting of the motion for summary judgment** according to the Federal Rules of Civil Procedure.

The appeals court did not address any of the bases proffered by appellant/petitioner in support of his appeal, and summarily ruled that there was "*no basis*" for the appeal.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO

CORRECT THE FOURTH CIRCUIT'S FAILURE TO OVERTURN SUMMARY JUDGMENT ON THE GROUND THAT THE DISTRICT COURT FAILED TO VIEW THE FACTS IN A LIGHT MOST FAVORABLE TO PETITIONER AND THAT IT EXCEEDED ITS AUTHORITY BY DECIDING JURY QUESTIONS

The district court incorrectly tried issues of fact in awarding summary judgment to ITT, and, compounding its error, viewed each issue of fact in a light most favorable to ITT rather than the petitioner as the nonmoving party, contrary to the Federal Rules and this high Court's prior decisions.

In Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct.2548 (June 25, 1986), while the primary issue before the Court concerned the standard to which the **moving party** was to be held, this Court also addressed the standard to which the **nonmoving party** is to be held when the courts evaluate a motion for summary judgment. Justice Rehnquist in

delivering the opinion of the Court, at 274, stated:

> "... *Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'* "
>
> "*We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid Summary Judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper Summary Judgment Motion to be opposed*

by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred."

Sinclair on Federal Civil Practice, Third Edition, Library of Congress Catalogue Number 92-081791, ISBN 0-87224-043-6, states at page 435: "*The primary principle in the Federal rules of Civil Procedure, Rule 56(e) is that in its determination as to whether or not to grant summary judgment, the court cannot try issues of fact; it can only determine whether there are issues to be tried. Moreover, any doubts that exist must be resolved by the court in favor of the party opposing the motion*" [emphasis

added].

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), this Court held that the evidence the nonmoving party must produce in order to avoid an adverse judgment will vary in accordance with the evidentiary standard of proof that will apply at the trial on the merits, and that the standard mirrors the standard for directed verdict Under Fed. R. Civ. P. 50(a), which means "*[if] reasonable minds could differ as to the import of the evidence*", summary judgment should **not** be granted. Other judicial guidance set forth in Anderson was as follows:

> - "*Only disputes over facts that might affect the outcome of the [law]suit under governing substantive law will properly preclude the entry of summary judgment*". [at 211]

- "*Summary judgment will not lie ... if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for a nonmoving party.*" and "*[i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial*" [at 212-

213]

- "... *the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.*" [at 212]

- "*Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ...*" [at 216]

As stated in Anderson v. Liberty Lobby, Inc., supra, the amount and types of evidence must necessarily differ, depending upon the type and complexity of the case in which summary judgment is contemplated. A review of recent age discrimination cases shows the following

have been held to be satisfactory evidentiary standards of proof enabling age discrimination plaintiffs to withstand motions for summary judgment by an employer-company [excerpts taken from 29 U.S.C. 621, et seq., annotated]:

- the evidence consists of "*strong anecdotal evidence*", Tuck v. Henkel Corp., 973 F.2d 371 (4th cir. 1992);
- "*evidence [is involved] which could raise inference of discriminatory motive underlying pretextual explanation*" and "*minimally sufficient evidence [exists], direct or indirect, both of pretext and of employer's discriminatory animus*", Lawrence v. Northrop Corp., 980 F.2d 66 (1st Cir. 1992);

- "*although summary judgment is not favored in claims of employment discrimination, it is nonetheless proper when there is no genuine issue as to any material fact and moving party is entitled to judgment as a matter of law*", Waggoner v. Garland, 987 F.2d 1160 (3rd Cir. 1993);

- "*Whether ADEA plaintiff was discriminated against because of his age is a question of fact that precludes summary judgment*", Clark v. Coats & Clark, Inc., (11th Cir. 1993);

- "*Even though the court believes that the issue presented in the case (whether plaintiff has proven his ability to present evidence*

sufficient for jury to return favorable verdict on his age discrimination claims) is extremely close, defendant's motion for summary judgment will be denied.", Bessier v. Precise Tool Engineering Co., 778 F. Supp. 15 (WD Mo 1991);

- *"Defendant's motion for summary judgment was denied, even though defendant met its burden of articulating legitimate nondiscriminatory reason for discharging plaintiff during reduction in force, since, inter alia, factual dispute existed over whether plaintiff was given option of another position or simply terminated.",* Just v. James River, II, Inc. 58 BNA

FEP Cas 376 (DC Del. 1992);

- *"To defeat defendant employer's summary judgment motion as to his prima facie case, plaintiff only needs to show that he has sufficient evidence from which reasonable trier of fact could find that elements of prima facie case have been proved; plaintiff need not prove his prima facie case by a preponderance of evidence.",* McConnell v. Thompson Newspapers, Inc., 802 F.Supp. 1484 (ED Tex. 1992);

- *"... summary judgment is improper in age discrimination case if decision concerning material issue requires weighing conflicting evidence of motive and intent.",* Darnell

v. Dayton Hudson Corp., 808 F.Supp. 1370 (SD Ind. 1992);

- "*Plaintiff employee who offers reasonably sufficient evidence of pretext along with elements of prima facie case will survive summary judgment motion.*", Reiff v. Philadelphia County Court of Common Pleas, 827 F. Supp. 319 (ED Pa. 1993).

Thus, the weight of authority in the United States holds that, although in age discrimination cases granting summary judgment to a defendant company is normally "*not favored*" and granted only on questions involving "*matters of law*" [Waggoner v. Garland], when a motion is allowed, the standard for an age discrimination plaintiff to successfully offset it, is one which allows: either direct or indirect evidence to be used to

counter the motion, Waggoner v. Garland, [petitioner has both]; and the evidence is minimally sufficient which could raise inference of discriminatory motive underlying pretextual explanation, Lawrence v. Northrop Corp., and reasonably sufficient evidence of pretext along with elements of prima facie case, Reiff v. Philadelphia County Court of Common Pleas, [petitioner has strong evidence of pretext as well as evidence of discriminatory actions taken against him and more favorable treatment given to the three named non-protected individuals]; marginal proof of plaintiff's ability to present evidence sufficient for jury to return verdict favorable to him, Bessier v. Precise Tool Engineering Co., and sufficient, but not a preponderance of, evidence from which reasonable trier of fact could find that

elements of prima facie case have been proved, McConnell v. Thompson Newspapers, Inc., [petitioner has much more than **marginal** proof and certainly what would be considered a preponderance of evidence by a jury].

Moreover, as held in Anderson, supra, when viewing petitioner's memorandum in opposition, his attached affidavits and evidentiary exhibits, it is readily apparent that "reasonable minds could differ as to the import of the evidence", "genuine disputes [exist] over facts that might affect the outcome of the [law]suit under governing substantive law" ..., and a jury could very well, if not easily, "return a verdict for petitioner based upon the evidence already presented".

It is clear, based upon Anderson, supra, that the district judge ought not

to have weighed said evidence himself, which he did time and time again in each of the matters in dispute; nor should he have acted as a jury in deciding said questions of fact and assigning the most favorable light to ITT instead of petitioner as the nonmoving party, all of which actions are in direct conflict with current case-law and this high Court's recent decisions. Petitioner is entitled to a trial by jury in accordance with 29 U.S.C.S. § 626(c)(2), that states in part: "*a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act*" [App. B1].

II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE FOURTH CIRCUIT'S FAILURE TO FOLLOW ITS OWN PRECEDENT WITH REGARD TO MCDONNELL DOUGLAS CRITERIA

Finally, although as stated earlier,

petitioner's evidence shows he does meet the test enunciated in McDonnell Douglas Corp. v. Green, supra, for all four elements, he also contends the McDonnell Douglas criteria is inapplicable in a summary judgment hearing and that the district court and the Fourth Circuit failed to follow its own precedent in this matter. In Smith v. University of North Carolina, 632 F.2d 316 (Fourth Cir., 1980) the Fourth Circuit, quoting Loeb v. Textron, Inc., 600 F.2d 1003 (First Cir. 1979), at 1018, held that "*[i]f the principle ingredients of plaintiff's case are to be derived from the underpinnings of the McDonnell Douglas-type prima facie case, the jury should be asked to make these findings.*"

Instead, in the instant case, the Fourth Circuit apparently agreed with the district court when it ruled

(incorrectly, petitioner contends) that petitioner failed to meet the fourth element (but, petitioner contends he **did** meet the fourth element) of McDonnell Douglas and therefore, summary judgment should not have been granted to the employer.

III. CERTIORARI SHOULD BE GRANTED TO RESOLVE A DIRECT CONFLICT BETWEEN THE FOURTH CIRCUIT COURT OF APPEALS AND OTHER CIRCUIT COURTS OF APPEAL INVOLVING THE DISCOVERY LATITUDE ALLOWED A PLAINTIFF IN AN AGE DISCRIMINATION LAWSUIT

The weight of authority in age discrimination lawsuits provides that the plaintiff be given wide latitude in his discovery program. Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir., 1975); Burns v. Thiokal Chemical Corp., 483 F.2d 300 (5th Cir., 1973). Petitioner contends that denial by the Court Below of his Motions to Compel Discovery, and limiting him to just 30

Interrogatories and 30 Requests for Production, denied him proper discovery latitude aforesaid - to the degree that his discovery program was never completed, and this alone should have stayed granting of Summary Judgment for both Counts per FRCP 56(c) and Celotex Corp. v. Catrett, 477 U.S. 317 at 273, 91 L.Ed.2d 265, 106 S.Ct.2548 (1986).

CONCLUSION

Certiorari should be granted with a view toward vacating and remanding back to the district court for trial Counts #1 and #2, relative to the grant of summary judgment in the instant case on the basis of unacceptable deviation by the lower court and the Fourth Circuit Court of Appeals from the Federal Rules of Civil Procedure, Rule 56(e) and the weight of authority regarding its implementation.

Certiorari should also be granted to

review the disparate views of various circuits in the matter of discovery allowed age discrimination plaintiffs with a view toward uniformity and consistency by the courts.

Respectfully submitted this 7th day of September 1994.

James J. Eder

By: B. K Cooney

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Appendices

Appendix A1. Opinion of the Fourth Circuit Court of Appeals

U. S. Court of Appeals, 4th Circuit
Appeal from the U. S. District Court,
Western District of Virginia, at Roanoke,
James C. Turk, Distr. Judge (CA-91-399-R)
James J. Eder, Appellant
v. ITT, et al., Appellees
Case Number 93-2318
Entered the 10th Day of June, 1994

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS

The following is an exact copy of the [unpublished] per curiam opinion of the United States Court of Appeals for the Fourth Circuit, Case No. 93-2318, regarding "Appeal from the United States District Court for the Western District of Virginia, at Roanoke, James C. Turk, District Judge (CA-91-399-R)". Argued: May 9, 1994. Decided: June 10, 1994, Before WILKINS and HAMILTON, Circuit Judges, and ELLIS United States District Judge for the Eastern District of Virginia, sitting by designation." Please note that the caption, closing, signature block(s) and other portions of this opinion that are not relevant to this petition have not been included:

"OPINION

PER CURIAM:

Appellant, James J. Eder (Eder), appeals the district court's grant of summary judgment to the appellee, ITT Corporation (ITT), on Eder's Age Discrimination in Employment Act claim, 29 U.S.C. § 621 *et seq.*, and state law breach of contract claim. These claims arose after ITT terminated Eder in May 1990. Our review of the briefs, the record, and the arguments of counsel, discloses that his appeal is without merit. Accordingly, we affirm the district court's grant of ITT's motion for summary judgment for the reasons stated in the opinion of the district court. Eder v. ITT Corp., CA-91-0399-R (W.D. Va. September 13, 1993).

AFFIRMED"

Appendix A2. Opinion of the District Court

U.S. District Court,
Western District of Virginia at Roanoke
James J. Eder, Plaintiff
v. ITT, et al., Defendant
Civil Action Number 91-0399-R
Entered the 13th Day of September, 1994

OPINION OF THE DISTRICT COURT

The following is an exact copy of the opinion of the District Court for the Western District of Virginia, Roanoke Division, given by the Honorable Judge James C. Turk, on September 13, 1993, Docket Item #33, page 7. Please note that the caption, closing, signature block(s) and other pro forma portions of this opinion not directly relevant thereto have not been included:

MEMORANDUM OPINION

By: Honorable James C. Turk
United States District Judge

"This case is before the court on defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

Upon careful consideration of the record, the applicable law, the briefs submitted by the parties, and the

arguments presented by counsel at the hearing, the court finds that defendants' motion for summary judgment must be granted.

I. Background

Despite the volume of pleadings, motions, memoranda, affidavits, and exhibits submitted by the parties, the basic facts of this action are relatively simple. Until 1982, plaintiff worked for ITT Defense Communications Division in New Jersey. In 1982, plaintiff was offered an executive position by ITT Electro-Optical Products Division (ITT-EOPD) in Roanoke, Virginia. At this time plaintiff was 50 years old. In 1985, ITT-EOPD determined that it could not support plaintiff's position as Director of Logistics and plaintiff was declared a "surplus" employee. Later in 1985, ITT-EOPD reassigned the plaintiff to the

position of Manager of Logistics. In 1988, ITT-EOPD gave the plaintiff a new job title of Manager of Products Support. Plaintiff was given additional responsibilities in marketing communications, commercial sales and warranty repair.

In 1990, ITT-EOPD learned it had not received a contract for one of its night vision products. Due to this loss in business, ITT-EOPD determined that it would have to lay off a significant number of hourly and salaried employees. In May, 1990, nineteen salaried workers, including the plaintiff, were notified that they were to be laid off.

On June 11, 1991, plaintiff filed a complaint alleging three counts: (I) violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, (II) breach of contract, and (III)

wrongful discharge in violation of public policy. On May 15, 1992, the court granted defendants' motion for summary judgment as to count III and ordered the plaintiff to file an amended complaint setting forth only those damages to which he was legally entitled under counts I and II. On June 12, 1992, plaintiff filed his amended complaint containing only counts I and II.

II. Analysis

Jurisdiction of the court is based upon a diversity of citizenship ...

FRCP 56(c) states that summary judgment is proper where "there is no genuine issue as to any material fact." In deciding a motion for summary judgment, the facts must be considered in the light most favorable to the non-

moving party. Moore v. Winebrenner, 927 F2d 1312, 1313 (4th Cir., 1991), cert. denied, 112 S Ct. 97 (1991).

In this case, the defendants bear "the initial burden of pointing to the absence of a genuine issue of material fact." Temkin v. Frederick County Comm'rs, 945 F2d 716, 718 (4th Cir. 1991), cert. denied, 112 S. Ct. 1172 (1992), citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the defendant demonstrates the absence of a genuine issue of material fact, "the burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact. Id. at 718-19, citing Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247-48 (1986).

A. Defendants' Motion for Summary Judgment.

Defendants have moved for summary judgment as to both counts I and II of plaintiff's amended complaint.

1. Count I: Violation of ADEA

To establish a claim under the ADEA, the plaintiff must "demonstrate that but for the employer's motive to discriminate against the plaintiff on the basis of his age, the plaintiff would not have been discharged." EEOC v. Clay Printing Company, 955 F2d 936, 940 (4th Cir. 1992). There are two ways for the plaintiff to overcome the defendants' motion for summary judgment: (1) produce direct or indirect evidence of discriminatory intent or (2) satisfy the test enunciated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Id.

To overcome a motion for summary judgment under the first

method, the plaintiff must "produce direct evidence of a stated purpose to discriminate [on the basis of age] and/or circumstantial evidence of sufficient probative force to reflect a genuine issue of material fact." Id. at 941 (citations omitted). It is undisputed that plaintiff had presented no direct evidence that ITT-EOPD discriminated against him on the basis of his age.

In terms of indirect evidence, plaintiff appears to rely on four facts: (1) he was the only person in his department that was laid off, (2) some of his job responsibilities were given to younger employees, (3) two fellow employees made comments referring to his age, and (4) he was not given another job available at the time of his layoff. The court finds these facts are not "of sufficient probative force to reflect a

genuine issue of material fact." Id.

First, while plaintiff was the only person in his department to be laid off, eighteen other salaried employees at ITT-EOPD were also laid off. Eight of these employees were over the age of forty and eleven were under the age of forty. The average age of these nineteen employees was forty, while the average age of all employees was forty-one. Also, eight of the employees in plaintiff's department, who were not laid off, were over the age of fifty. Therefore, in light of these facts, the fact that plaintiff was the only person laid off in his department does not indicate that ITT-EOPD discriminated against him on the basis of his age.

Second, it is true that plaintiff's position was eliminated and some of his duties were taken over by three employees

under the age of forty: (1) Laurel Holder, age 33; (2) Randy Comer, age 31; (3) Danny Woodford, age 34. However, it is also true that some of plaintiff's duties were assumed by three employees over the age of forty: (1) Robert Williams, age 55; (2) John Peters, age 62; and (3) Rod Jack, age 57. Therefore, that fact that some of plaintiff's duties were distributed to employees under the age of forty is not sufficient to indicate the ITT-EOPD discriminated against him on the basis of his age.

Third, plaintiff claims that two fellow employees made statements concerning his age. However, in his deposition plaintiff could not recall the specific comments and stated that they were made in jest or as part of "friendly banter". It is clear that such statements do not demonstrate an intent

to discriminate against the plaintiff on the basis of his age.

Fourth, the position that was filled shortly after the plaintiff's lay off was Manager of Product Applications. This position had been previously occupied by an employee with a military background and experience in the actual use of ITT-EOPD's night vision products. ITT-EOPD wanted to fill this position with another person with similar military experience. In August, 19990, ITT-EOPD hired Dan Turner, who had spent over twenty years in the United States Army. ITT-EOPD states that plaintiff was not considered for this position because he did not have the requisite military experience. Since ITT_EOPD ultimately hired an individual

with substantial military experience, the fact that plaintiff was not hired for this position does not indicate that ITT-EOPD discriminated against the plaintiff on the basis of his age.

Although plaintiff has not produced sufficient direct or circumstantial evidence, he may still survive summary judgment by satisfying the McDonnell Douglas scheme. Under this method, plaintiff must demonstrate four elements: "(1) he is a member of a protected class, (2) he was discharged, (3) at the time of his discharge he was performing at a satisfactory level, meeting his employer's legitimate expectations, and (4) following his discharge, he was replaced by a person outside the protected class." Id. at 941. If the plaintiff proves all four elements, the burden shifts to the defendant to

articulate some legitimate, non-discriminatory reason for the employee's rejection." Id. If the defendant articulates such a reason, "the plaintiff must demonstrate by a preponderance of the evidence that defendant's reasons were a pretext for discrimination." Id.

In this action, it is undisputed that plaintiff satisfies the first three elements of the McDonnell Douglas scheme. However, defendants argue that plaintiff fails to satisfy the fourth element. The Clay Printing court has stated, "in reduction of force cases, the fourth element may be satisfied by showing "that persons outside the protected class were retained in the same position or that there was some other evidence indicating that the employer did not treat age neutrally in deciding to dismiss the plaintiff." Id. Viewing the facts in

the light most favorable to the plaintiff, the court finds that he has not satisfied the fourth element. First, plaintiff's position was eliminated, therefore, no person was appointed to or retained in the same position. Second, plaintiff's duties were taken over by six different employees. As discussed above, three of these individuals were over the age of forty, i.e. not outside the protected class. Thus, there is insufficient evidence to indicate that ITT-EOPD was not age-neutral in deciding to dismiss the plaintiff.

Even if plaintiff could satisfy the fourth element, he has failed to produce "sufficient probative evidence that the legitimate, non-discriminatory, reasons for discharge offered by [the defendants] were pretextual or unworthy of credence. Id. at 943. ITT-EOPD has stated that in

the course of its reduction of salaried employees, it determined that plaintiff's position was not essential and that his duties could be distributed among several employees without substantially increasing their work loads. It is clear that ITT-EOPD made a effort to lay off employees in a non-discriminatory manner. As discussed above, that average age for those employees laid off was very similar to the average age of all current employees. Therefore, the court finds the evidence insufficient to prove that ITT-EOPD's stated reasons were pretextual or unworthy of credence.

Viewing the facts most favorably to the plaintiff, the court finds that he has failed to produce sufficient direct or indirect evidence to demonstrate that he would not have been laid off "but for" age discrimination on the part of ITT-

EOPD. Also, plaintiff cannot satisfy the fourth element of the McDonnell Douglas scheme. therefore, the court finds that defendants' motion for summary judgment must be granted.

B. Count II: Breach of Contract

It is undisputed that plaintiff did not have a written employment contract. However, plaintiff claims that statements made by certain ITT-EOPD employees and various ITT-EOPD policies created a binding employment contract. Defendants argue[s] that these statements and policies are insufficient to rebut the presumption that plaintiff was an at-will employee.

It is well settled that "Virginia has not deviated from the common-law doctrine of employment at will ..." Bowman v. State Bank of Keysville, 331 S.E. 2d 797, 800 (Va. 1985). "where no

specific time is fixed for the duration of the employment, there is a rebuttable presumption that the hiring is terminable at will." Miller v. Sevamp, inc. 362 SE2d 915, 917 (Va. 1987). Plaintiff may overcome this presumption by showing promises or statements made by ITT-EOPD amounting to additional consideration for his services. Id.

Plaintiff claims that an ITT-EOPD policy manual contained statements which support his claim for breach of contract. However, in his deposition, plaintiff could not point to any particular language in the manual that showed that he had a binding contract with ITT-EOPD. Instead, plaintiff stated that the manual as a whole guaranteed "fair treatment, no arbitrary dismissal in return for good performance on the employee's part." This is

nothing more than the plaintiff's general conclusion concerning this manual and does not support his contention that he had an employment contract with ITT-EOPD.

Plaintiff also claims that there was an "unwritten policy" that the termination of anyone over 40 would be reviewed by ITT's corporate headquarters in New York. In his deposition, plaintiff states he heard about this policy in the 1970s. However, plaintiff named only Ron Nival[a]i, a corporate officer with ITT in New Jersey, as the source of this policy. It is clear that vague recollections of an "unwritten policy" are insufficient to support plaintiff's breach of contract claims.

Finally, plaintiff claims that four ITT-EOPD employees made verbal promises to him which support his claim for breach

of contract. first, plaintiff claims that Robert Williams, the Director of Business Development, told him that he would have a job as long as he wished, as long as his performance remained satisfactory. Second, plaintiff claims that Rudy Finderson, the Director of {Personnel, stated that plaintiff ought to stay at ITT-EOPD until he retired. Third, plaintiff claims that Jack Shirman, former ITT-EOPd President, stated "it looks like you will get your department back". Fourth, plaintiff claims that George Ashmore, then President and General Manager, stated that "there has a been a gross error in judgment made with regard to your role here at ITT-EOPD.

Assuming that these statements were made to the plaintiff, they are insufficient to overcome the presumption

that plaintiff was an at will employee. None of these statements promises plaintiff additional consideration for remaining an employee. Furthermore, ITT Administrative Practice No. 10.3 states that "either ITT or the employee may terminate the employment relationship at any time, subject to notice provisions." As the Miller court stated when considering a similar statement, "[a] clearer expression of intent to create an at-will employment can hardly be imagined." Id. at 918. Therefore, the court finds that plaintiff was an at-will employee and must grant defendants' motion for summary judgment as to count II.

III. Conclusion

For the reasons stated, the court finds that the defendants' motion for summary judgment must be **GRANTED**. An

appropriate order consistent with this memorandum opinion shall be entered this day.

ENTERED THIS 13th DAY OF Sept., 1993.

_____

United States District Judge

Appendix B1. Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.

AGE DISCRIMINATION IN EMPLOYMENT ACT

SUMMARY:

This is an excerpt from U. S. Code, Title 29, Sections 621 through 634, of those requirements pertinent to subject age discrimination lawsuit.

"CONTENTS:

Section	Description
621	Congressional statement of findings and purpose
622	Education and research program; recommendation to congress **[Not included]**
623	Prohibition of age discrimination
	(a) Employer practice
	(b) Employment Agency Practices **NOT INCLUDED]**
	(c) Labor Organization Practices **[NOT INCLUDED]**
	(d) Opposition to Unlawful Practices; Participation in Investigations,

proceedings or litigation [NOT INCLUDED]

(e) Printing of publication of Notice or Advertisement Indicating Preference, Limitations, etc. [NOT INCLUDED]

(f) Lawful Practices; Age an Occupational Qualification; Other Reasonable Factors; Seniority system; Employee Benefit Plans; Discharge or Discipline for Good Cause.

(g) [Deleted]

(h) Foreign Practices [NOT INCLUDED]

(i) Employee Pension Benefit Plans; Cessation or Reduction of Benefit Accrual or of Allocation to Employee Account; Distribution of Benefits After Attainment of Normal Retirement Age;

Compliance; Highly Compensated Employees

[j](i) Employment as Firefighter or Law Enforcement Officer **[NOT INCLUDED]**

624 Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

625 Administration **[Not Included]**

626 Recordkeeping, investigation and enforcement

(a) Attendance of witnesses; investigations, inspections, records and homework regulations **[NOT INCLUDED]**

(b) enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion **[NOT INCLUDED]**

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial

(d) Filing of charge with Secretary; timeliness; conciliation, conference and persuasion **[NOT INCLUDED]**

(e) Statute of Limitations; reliance in future on administrative rulings, etc; tolling **[NOT INCLUDED]**

627 Notices to be posted **[NOT INCLUDED]**

628 Rules and regulations; exemptions **[NOT INCLUDED]**

629 Criminal penalties **[NOT INCLUDED]**

630 Definitions **[NOT INCLUDED]**

631 Age limits

(a) Individuals at least 40 years of age

(b) Employees or applicants for employment; in Federal Government **[NOT INCLUDED]**

(c) Bona fide executives of high policy makers **[NOT INCLUDED]**

(d) Tenured employees at institution of higher education **[NOT INCLUDED]**

632 Annual report to Congress **[Not Included]**

633 Federal-State relationship [NOT INCLUDED]

(a) Federal action superseding state action [NOT INCLUDED]

(b) Limitation of Federal action upon commencement of State proceedings [NOT INCLUDED]

633a Nondiscrimination on account of age in Federal Government employment

(a) Federal Agencies affected [NOT INCLUDED]

(b) Enforcement by civil Service Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders and instructions of Commission: compliance by Federal Agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions; bona fide occupational qualifications [NOT INCLUDED]

(c) Civil actions; jurisdiction and relief

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful

practices [NOT INCLUDED]

(e) Duty of Government Agency or official NOT INCLUDED]

(f) Applicability of statutory provisions to personnel action of Federal departments, etc; [NOT INCLUDED]

(g) Study and report to President and congress by Civil Service commission; scope [NOT INCLUDED]

634 Authorization of appropriations [NOT INCLUDED]

§621 Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that -

(1) In the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from their jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of

skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this Act {29 USCS §§ 622 et seq.;} to promote employment of older persons based upon their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§623 Prohibition of age discrimination

(a) Employer Practices. It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this act.

(b) Employment agency practices. [NOT INCLUDED]

(c) Labor organization practices. [NOT INCLUDED]

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any member thereof or applicant for membership, because such individual member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. [NOT INCLUDED]

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system;

employee benefit plans; discharge or discipline for good cause. [NOT INCLUDED]

(g) Deleted

(h) Foreign practices. [NOT INCLUDED]

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees.

[(j)](i) Employment as firefighter or law enforcement officer. [NOT INCLUDED]

§624 Study by Secretary of Labor [NOT INCLUDED]

§625 Administration [NOT INCLUDED]

§626 Recordkeeping, investigation and enforcement

(a) Attendance of witnesses; investigations, inspections, records and homework regulations. [NOT INCLUDED]

(b) enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference and persuasion.

The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in

sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217) [29 USCS §§ 211(b), 216, 217], and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS § 623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215) [29 USCS § 215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938,, as amended (29 USC 216, 217) [29 USCS §§ 216, 217]: Provided, that liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the

court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgements compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial.

(1) Any person aggrieved may bring a

civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purpose of this Act; Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act. (2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Secretary; timeliness; conciliation, conference and persuasion. [NOT INCLUDED]

(e) Statute of Limitations; reliance in future on administrative rulings, etc; tolling. [NOT INCLUDED]

§627 Notices to be posted. [Not Included]

§628 Rules and regulations; exemptions.

[NOT INCLUDED]

§629 Criminal penalties. [NOT INCLUDED]

§630 Definitions. [NOT INCLUDED]

§631 Age limits.

(a) Individuals at least 40 years of age. The prohibitions in the Act shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment; in Federal Government. [NOT INCLUDED]

(c) Bona fide executives of high policy makers. [NOT INCLUDED]

(d) Tenured employees at institution of higher education. [NOT INCLUDED]

§632 Annual report to Congress. [Not Included]

§633 Federal-State relationship. [NOT INCLUDED]

(a) Federal action superseding state action. [NOT INCLUDED]

(b) Limitation of Federal action upon commencement of State proceedings. [NOT INCLUDED]

§633[AMENDED] Nondiscrimination on account of age in Federal Government employment. [NOT INCLUDED]

(a) Federal Agencies affected. [NOT INCLUDED]

(b) Enforcement by civil Service Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders and instructions of Commission: compliance by Federal Agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions; bona fide occupational qualifications. [NOT INCLUDED]

(c) Civil actions; jurisdiction and relief. [NOT INCLUDED]

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices. [NOT INCLUDED]

(e) Duty of Government Agency or official. NOT INCLUDED]

(f) Applicability of statutory provisions to personnel action of Federal departments, etc; [NOT INCLUDED]

(g) Study and report to President and congress by Civil Service commission; scope. [NOT INCLUDED]

§634 Authorization of appropriations. [NOT INCLUDED]

Appendix C1. Summary Employment Chronology, Petitioner

Appendix C1. Summary Employment Chronology, Petitioner

Commencing his employment with ITT[18] on May 23, 1957 in Alaska, Petitioner received numerous promotions during his 33-year career as a result of his expertise and dedication to ITT.

In 1982, he was a senior manager at ITT's New Jersey plant. He had a reputation for successfully building new departments, introducing automation for the corporation, and as an expert in Department of Defense program management and logistics methods. In 1982, ITT offered Petitioner a position as

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[18] Facts relative to Eder's employment history and termination were set forth in the "Affidavit of James J Eder", Page 1, Exhibit I to Memorandum in Opposition to Defendants' Motion for Summary Judgment, filed with the court below on September 5, 1993 (docketed but not numbered by court below). Direct quotes from this affidavit are included throughout this brief.

Logistics Director for its fiber optics product line in Roanoke, Virginia. He was advised by the company president that its fiber optics product line was ready to "take off" and that its night vision product line was to be discontinued. Petitioner was promised this would be his last relocation with ITT and he would have a "job to retirement". At the same time, Petitioner was offered a position with McDonnell Douglas as Director of Automation Resources at the same or slightly higher salary. Petitioner accepted ITT's offer, and declined the offer from McDonnell Douglas. He relocated to Roanoke, Virginia in the Fall of 1982, leaving family and friends in New Jersey. He created an efficient logistics department introducing automation and instituted program management methods for this ITT division,

switching to ITT's night vision product line after ITT sold its fiber optics line (in 1985).

Petitioner's record with ITT from this time to the time of his termination was very successful as detailed in parts of his affidavits contained in subsequent sections of this brief. In 1988, while assigned to Mr. R. Williams, a corporate officer (Director/Vice President), overseeing a 22-person Business Development department, Petitioner was assigned to inaugurate a new U.S. Commercial Sales Program and an Advertising/Public Relations Program for the company in addition to his logistics duties. His work role in these new ventures was to be, per Williams, "as an individual", rather than as a manager, even though his manager salary grade and status was maintained in recognition of

his expertise[19]. In return and consistent with his track record at ITT, Petitioner personally developed very successful commercial sales and advertising programs (these have been unequalled since). His efforts resulted in a tenfold increase in sales and, through advertising, he brought the company's image from that of unknown to that of the world's leading Generation III night vision manufacturer. He helped design and develop new Generation III products that brought in hundreds of thousands of dollars of sales and provided technical support to the ITT's Advanced Research and Development Projects.

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[19] It was not unusual at ITT-EOPD to have an individual with a title such as "Manager", signifying supervision over a department, when, in reality there were no other employees assigned to that individual.

On March 31, 1989 Petitioner was advised by Williams that ITT corporate had directed that L. Holder, a 35-year old (approx.) employee, take over his advertising/PR duties. Petitioner objected, stating that this action would be in violation of the ADEA. In the succeeding months prior to his formal termination, while overt reassignment of his duties to the younger employee never materialized [presumably because of Petitioner's response aforesaid] a series of more subtle acts of reassignment of some of Petitioner's Advertising/PR duties to L. Holder commenced; also, a new employee (R. Comer) was hired in the Fall of 1989 and additional duties of Petitioner's [Sales, Warranty Repair Operations] were turned over to him between then and May, 1990. Already alerted by Williams as to the company's

intent to replace him with younger employee(s), every time an incident occurred that showed his work being redistributed, Petitioner retained in his files evidence of these acts as they occurred. At the time of his termination on ITT-alleged grounds of a reduction in force, Petitioner had some 400 memoranda and documents showing the company's intent and actual acts taken to replace him with younger individuals. On or about the day of his termination, all of Petitioner's work was reassigned to three 35 year old employees, all managers as was Petitioner, and all assigned to the same 22-person department in which Petitioner worked.

Details of these facts were filed with the Court Below in Petitioner's counter-affidavit and evidentiary

exhibits[20], as well as in Petitioner's complaint. These pages are quoted below, and therefore not repeated in the Appendix [Per the Fourth Circuit Case Manager]:

"To summarize the circumstances leading up to and surrounding my termination as will be shown by my evidentiary exhibits and attested to by witnesses:

> Orders had been given in mid-198[9] to give roughly 33% of my duties [MARCOM (advertising)] to a younger employee, L. Holder. This part of the action was "decreed", "locked", and ordered by

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[20] Exhibit II to Memorandum in Opposition to Defendants' Motion for Summary Judgment, submitted to the court below on September 5, 1993 (docketed but not numbered by court below), pages 6 through 13, and page 14 (top).

"corporate", as told to me by my superior, Mr. R. Williams in March, 1989 [Please refer to my response to Mr. Williams' affidavit, items 12, 13 and 14, below and Evidentiary Exhibit 164, dated March 31, 1989]. The corporation in general and Mr. Williams in particular having reached this decision, there remained only the consideration of what to do with the other -67% of my duties [logistics engineering, business services, U.S. Commercial Sales, warranty repair operations].

I had been training one of the younger employees, Mr. D. Woodford, in still another aspect of my assignments -

logistics engineering, and even though he had not recently worked very often in this area, Mr. Williams believed Mr. Woodford could pick up these duties; Mr. Williams also believed D. Woodford could pick up the previously-directed "loose supervision" of Business Services [Editing, Technical Writing, Graphics] as well because Mr. Woodford already knew "something" about computers and occasionally worked with some of the Business Services people in connection with his current duties of specification changes/Configuration Management. Thus, Mr. Williams concluded Mr. Woodford could

pick up this portion of my duties at any time without any preparation [in fact, defendants admitted Mr. Woodford did pick up these duties that were previously assigned to me in response to our request for admissions submitted in May, 1993]

This left -33% of my duties uncovered [warranty repair operations, U.S. Commercial Sales]. The solution for this was to hire a new employee who would take over warranty operations and U.S. Commercial Sales, which is exactly what took place in mid-1989 with the hire of Mr. Comer [Evidentiary Exhibit 88, June, 1989], after an initial

clandestine interview in December, 1988 [Evidentiary Exhibit 195, December, 1988] to which I was not invited. The ultimate assignment of my U.S. Commercial Sales responsibilities to Mr. Comer was "telescoped" by the expansion of his duties as announced in his introductory letter from Mr. Williams [Evidentiary Exhibit 112, June 1989]. [Actually, a Mr. Jack Kempster had started to receive my assignments [Evidentiary Exhibits 104, 141, 144] but plans were changed when it was determined that Mr. Kempster would replace the Quality Assurance Director, Mr. D. Prillaman, who would be

terminated in connection with discrepancies in Environmental Test measurements] [Evidentiary Exhibit 20]. Mr. Comer was initially assigned to me and trained by me for the warranty repair operations at Mr. Williams' insistence between mid-1989 to December, 1989 [Evidentiary Exhibit 111]. In December, 1989, this one aspect of my duties - warranty repair operations - was completely turned over to Mr. Comer by Mr. Williams and Mr. Comer was reassigned to another individual in the same 22-person department [Evidentiary Exhibit 68 ...].

At this time, with Holder slated to take MARCOM

(advertising) duties and actually receiving some, [Evidentiary Exhibits 41, 45, 60, 145, 150, 155, 194, 206, 230, 235, 240, (more)] Woodford slated to take logistics engineering and business services, and warranty repair already turned over to Comer, only U.S. Commercial Sales remained to be "covered". The solution for this was to have me train Mr. Comer in this area between late 1989 and my termination date [despite the fact he was now reporting to someone else in the same 22-person department], expose Comer to trade shows and U.S. Commercial Sales customers, which actions were

systematically accomplished [Evidentiary Exhibits 16, 17, 19, 23, 25, (more)]. Once satisfied the operations assigned to me could "get by" with the aforesaid reassignments, it was concluded that I could be "dropped" at any time, resulting in considerable savings to the company in general and to the department in particular in terms of actual and potential overhead expenses and cost of doing business.

In late 1989, R. Comer and L. Holder were assigned to permanently charge their time to an overhead account. Once assigned to an overhead account, there is no way to

differentiate work (time charges) by the [soon to be "curtailed"] Generation II or Generation III product line account numbers. [Evidentiary Exhibits 88, 91, July and August, 1989, respectively]

The only remaining consideration was that the termination action had to be taken in a manner that would not be appear to be discriminatory. Obviously, it would be best if I voluntarily left the company. However, despite ever-increasing hostility and lack of support from my superior between the latter half of 1988 and 1990 designed to achieve this end, [Evidentiary Exhibits 14, 15,

49, 65, 67, 71, 81, 72, 77, 78, 85, 86, 89, 103, 107, 114, 122, 123, 124, 154, 156, 160, 166, 168, 169, 176, 188, 191, 198, 247 (more)] I did not leave the company. Knowing that it was just a matter of time before the Generation II product line would be eliminated or severely cut back, and that this would result in a large reduction in force, that was the obvious time to effect the termination action on the company's part, masking any implication of discrimination.

In March, 1990 I was given a downwardly distorted performance appraisal rating of "4", "Results at Standard", [a tactic that seems to have been

employed on other occasions by this division of ITT - Messrs. Blank, Siegrist, for example] that attempted to walk a line between ranking my performance less than the ratings of the three personnel destined to take over my duties, but not so poor as to create a reaction on my part [however, the rating so grossly understated my true accomplishments that I did object to it in writing - Evidentiary Exhibit 251].

The major flaws in the aforesaid plans were:

- In his haste to implement transfer of my MARCOM work to L. Holder, on March 31, 1989, Mr. Williams told me of his plans [Evidentiary Exhibit 164,

March 31, 1989], apparently in the hope I would acquiesce on the basis that it was a "corporate" decision. When I responded that I felt this would be [age] discriminatory, rather than immediate and official reassignment of my duties to L. Holder Mr. Williams reverted to what he believed was a more subtle approach, continuing with the execution of his plans by more gradual assignment of my work to her [Please refer to my response to Mr. Williams' affidavit, Items 12, 13 and 14 below, and to above-stated Evidentiary Exhibits 41, 45, 60, 145, 150, 155, 194, 206, 230, 235, 240].

- Once Mr. Comer came aboard in mid-1989, transfer of my warranty repair and U.S. Commercial tasks began to unfold, with Warranty Repair Operations officially given to Comer on December, 1989, and other duties of mine in U.S. Commercial Sales being disbursed to him gradually from late 1989 to my departure in May, 1990 at which time he was formally assigned U.S. Commercial Sales.

- Finally, my termination ignored my future participation in about 10 of the company's Internal Research and Development Projects with our Advanced Development Engineers. Between late 1989 and March,

1990, detailed schedules and budgets had been agreed upon between myself and Engineering for my participation in these projects. This assigned to me a U.S. Government-funded labor base that would have extended at least into 1993. The projects were long-term projects that required continued evaluation of designs from their conceptual phases through their definitive, final phases [Evidentiary Exhibit 65, 78, 252]. Even though taken together all of my duties exceeded a normal 40-hour work week, it was common knowledge and accepted and approved by the company that I, at no charge to the company, worked

many extra hours at home during early morning and evening hours of the work-week and the equivalent of full-time on weekends [Evidentiary Exhibit 61].

As defendants would have us believe, my performance, depending upon which affidavit one reads, was "marginal", "adequate", or "not bad". I believe my record stands on its own in this regard. [Evidentiary Exhibits ..., ...,]" [here, Petitioner refers to over 40 evidentiary exhibits of his performance, but since the Court Below considers performance no longer an issue (App. 330; Opinion pg. 6), these references have been

excluded] "... While the above exhibits speak for themselves, for additional verification of performance refer also to affidavits from two military officers and one ex-ITT Program Manager attached as Exhibit III to my attorney's Memorandum in Opposition to Defendants' Motion for Summary Judgment.

As my referenced evidentiary exhibits show, these are not just speculated or hypothesized actions; nor are they "illusory" as defendants would have one believe; they are documented facts. Once I became aware of what was unfolding [simply because I was told about it], I routinely placed pertinent

notes and records in my personal files, the documentation reflecting each action that supported what I was told by my superior was to happen. Some two months after my termination I was allowed to remove these records over a weekend in the presence of the Security Manager. Defendants' attorneys may refer to this as "hoarding", but from my standpoint saving the records was prudent; removing them even more so because of defendants' inadequate discovery responses and subsequent destruction of these personal files..."

On May 18, 1990, while Petitioner was conducting a meeting with distributors for his U.S. Commercial

Sales activities, he was summoned to Mr. D. Hershey's office (Director of Personnel), where he was informed that he was terminated by ITT. He was handed a written letter that stated the reason for his termination was "due to curtailment of the Generation II [night vision] product line" - a product line he was not assigned to nor worked on [over 95% of his work was associated with the prosperous Generation III night vision product line, for which the company had just received (about April, 1990) a new contract valued at - $120,000,000.00]. This, and other reasons detailed below, led Petitioner to charge pretext in his complaint of Age Discrimination. Some of the other indicators of pretext are: during discovery, ITT began to change its reason for Petitioner's termination, indicating his performance was the major

factor. However, in the Hearing of August 17, 1993, ITT conceded that job performance was no longer an issue.

On August 17, 1993, the Court Below at an oral Hearing, granted Summary Judgment to ITT for Count #2, Breach of Implied Contract, and set the Age Discrimination count of the lawsuit for trial on March 1, 2, 3, and 4, 1994.

But the Court Below in its written Order and supporting Memorandum (App. 335, 325, resp.; Docket entries 34, 33, resp. 9/13/93) granted Summary Judgment to ITT for **both** counts of the lawsuit, rather than dismissing just the single count #2 as indicated by the lower court in the oral Hearing, without further inputs from Petitioner.

Appendix C2. Plaintiff's Exhibits Proving Discrimination, Pretext

Appendix C2. Plaintiff's Exhibits Proving Discrimination, Pretext

The following is part of petitioner's affidavit, starting on page 39, provided as part of his Memorandum in Opposition to Defendants' Motion for Summary Judgment, Exhibit I, submitted to the district court in August 5, 1993, unnumbered docket item, page 7.

"There are two interrelated aspects to my termination by ITT. First, all of the documentation that I found in those personal files I was allowed to bring home about two months after termination shows that my termination was planned by my immediate superior, Mr. R. Williams in mid-1988. The evidence supports a scenario where I was to be gradually "eased out" of the company, as a result of my higher salary owing to my long years of service to ITT. This "easing

out" was to be implemented in two forms: increasing hostility by Mr. Williams and gradual turnover of my duties to other personnel. Second, as my evidence will show, if this "easing out" did not force me to change jobs voluntarily, I would be terminated for a reason that could not be outwardly tied to age discrimination. While new, younger employees were gradually trained by me at the insistence of Mr. Williams and given my work over the one and one half years prior to my termination, and Mr. Williams did succeed in making my environment extremely miserable, I never voluntarily left the company and continued to be an excellent and creative producer at the work to which I was assigned. When the company's Generation II product line became defunct, it presented an artificial reason to terminate me that superficially

and statistically, from an overall division standpoint, appeared legitimate. The reason I became suspicious of these plans earlier than my actual termination date was simply because my immediate superior told me about them in regard to one individual that was targeted to take over one of my key responsibilities. He also took other similar actions in attempting to re-distribute my work with regard to other individuals in the succeeding monthshat were obvious. In addition, I received friendly "warnings" from two Director level or above personnel of Mr. Williams' plans to replace me with these younger people. I intend to present some 50 evidentiary exhibits that substantiate the above. With regard to one employee, a Ms. L. Holder, age approximately 35, the following discussion took place between

Mr. R. Williams and myself on March 31, 1989:

1. On March 31, 1989, Mr. R. Williams, Director, Vice President, Business Development, ITT Electro Optical Products Division, 7635 Plantation Road, Roanoke, Virginia 24019, advised me in his office:

> "Laurel Holder will be given Marketing Communications and report directly to me. You have too much to do. Besides it's political, emanating from the top DTC level; we need to promote women in the organization; Think it over over the weekend, but the decision is locked. I realize you like Marketing Communications and you do well in it, but this is necessary."

2. I replied to Mr. Williams that I believed this action would be in violation of the laws governing age discrimination.

3. Because of the significance of this statement and its implication on my 30-year career with ITT Corporation, I immediately upon return to my office, some 5 minutes later, I wrote down the exact words used by Mr. Williams as quoted in item 1, above.

Prior to and after dictum by Mr. Williams, there ensued a series of events that proved he in fact was to carry out the reassignment of my duties to Ms. Holder. A sample of these events is tabularized below and details of each event will be presented at trial as evidentiary exhibits:

EXHIBIT NUMBER	DATE OF DISCRIMINATORY ACTION	DESCRIPTION OF DISCRIMINATORY ACTION
164	March 31, 1989	RW advises LH will take over MARCOM; says order "is political"
41	April 5, 1989	RW assigns LH work directly (briefing by EOPD to Aviation Week Editor)
45	April 19, 1989	LH ordered by RW to get business cards made with words "Manager, Marketing Communications"
60	May 8, 1989	LH relieved of all Research & Development Support (Editing) work by RW; put in Marketing Communications (JS & JE had to take over)
119	June 23, 1989	L. Holder demands promotion, private office, secretary (and later RW authorizes this)
91	August 31, 1989	L. Holder assigned to permanently charge Overhead (removes definition of actual work assignments from accounting records)
239	September 1, 1989	RW again dealing directly with LH, bypassing JE; now orders her to submit a weekly report directly to him
240	September 14, 1989	RW again dealing directly with LH
145	November 7, 1989	LH assignment of private line by RW (JE has none despite more than 2000 calls/year re. his Sales work)
150	November 20, 1989	LH trip to Washington to meet with DTC; JE again excluded by RW.
155	December 1, 1989	JE remarks to RW about move to back of building and J. Kempster & LH being given my work and duties.
194	December 6, 1989	More of RW dealing directly with LH, bypassing JE
83	January 31, 1990	L. Holder 8% merit increase (everyone else gets much less); Preferential treatment
20	March 1, 1990	LH attends Trade Show; JE not invited.
9	March 15, 1990	RW's working directly with L. Holder, bypassing JE
3	March 15, 1990	RW's working directly with L. Holder, bypassing JE
13	March 30, 1990	RW's working directly with L. Holder, bypassing Eder ;instructs LH to deal with DTC

EXHIBIT NUMBER	DATE OF DISCRIMINATORY ACTION	DESCRIPTION OF DISCRIMINATORY ACTION
18	April 16, 1990	RW's working directly with L. Holder, bypassing Eder (Senate Award Banquet for Productivity Award written by JE)
23	April 30, 1990	RW Reassigns JE work to L. Holder; writes directly to LH; says LH & RC to Copex
21	May 1, 1990	RW's working directly with L. Holder, bypassing JE

4. Immediately upon the above meeting and advice by Mr. Williams there began a series of events authorized by Mr. Williams that were on their face designed to turn over more and more of my work to Ms. L. Holder and to other younger employees. For obvious reasons, I retained copies of these in my files or made memory refresher notes regarding each such event. I intend to present these in the form of approximately 20 evidentiary exhibits.

Mr. Comer, age approximately 35, was another individual chosen to replace me. In late 1988 he was secretly interviewed by Mr. Williams. I use the term "secretly" because I was never made aware of the interview even though the interview was in connection with "product support" duties that were assigned to me.

I was told about the interview by the Director of International Marketing, Mr. P. Siegrist, a witness in this case. Later, in mid-1989, Mr. Comer was again brought in, this time for a formal interview in which I was given about 10 minutes with him in what I viewed as a pro forma interview. Mr. Comer was hired in June, 1989 as a "Customer Service Manager". Subsequently, commencing with the letter announcing and expanding on what I was originally told would be Mr. Comer's duties, there began a series of directions by Mr. Williams for Mr. Comer to take over my duties. I intend to present approximately 30 evidentiary exhibits supporting facts.

A. SALARY, BENEFITS SAVINGS FOR ITT EOPD FROM MY TERMINATION:

At time of my termination my salary was $76,000 per year. Retirement income

for which I was eligible upon early retirement was in the order of $39,000.00 per year. Had I been allowed to work to the mandatory retirement age of 70 years, my salary, with normal or routine merit increases would have been approximately $125,000.00 per year. At that time my retirement income would have been approximately $81,000.00 per year. Thus, in addition to saving my $76,000.00 per year in salary, because I had no other alternative than to take early retirement in May of 1991, ITT has saved and will continue to save approximately $42,000.00 per year in my retirement income. There are additional savings that will accrue to ITT as a result of my having to withdraw some $65,000.00 from my ITT savings plan in late 1990 in an (unsuccessful) attempt to fend off retirement and bankruptcy. ITT will no

longer have to contribute the matching savings that it would have had to contribute had I remained employed and continued to participate in the ITT savings plan. All of the above losses to me and gains to ITT resulting from my termination are detailed in my response to ITT's Second Set of Interrogatories and Second Request for Production of Documents, Interrogatory No. 18. The total savings accruing to ITT and losses accruing to me as a result of my termination are in the order of $3,000,000.00 [Three Million Dollars]."

c) Attached Evidentiary Exhibits, or exhibits designated for trial, that supported petitioner's counter-affidavit; and additional detailed references to some 400 other evidentiary exhibits and

named witness that he intended to use at trial to further prove his complaint. All of these were turned over to ITT during the discovery process.

Appendix C3. Evidence of Pretext Submitted to Lower Court

EVIDENTIARY EXHIBIT # 164
AND OTHERS SHOWING PRETEXT

The following was identified as contained in Exhibit 164 in petitioner's Memorandum in Opposition to Defendants' Motion for Summary Judgment, Exhibit I, page 40, submitted to the district court on August 5, 1993, unnumbered docket item, page 7.

"The following discussion took place between Mr. R. Williams and myself on March 31, 1989:

> 1. On March 31, 1989, Mr. R. Williams, Director, Vice President, Business Development, ITT Electro Optical Products Division, 7635 Plantation Road, Roanoke, Virginia 24019, advised me in his office:
>
> "Laurel Holder will be given

Marketing Communications and report directly to me. You have too much to do. Besides it's political, emanating from the top DTC level; we need to promote women in the organization; Think it over over the weekend, but the decision is locked. I realize you like Marketing Communications and you do well in it, but this is necessary."

2. I replied to Mr. Williams that I believed this action would be in violation of the laws governing age discrimination.

3. Because of the significance of this statement and its implication on my 30-year career with ITT Corporation,

immediately upon return to my office, some 5 minutes later, I wrote down the exact words used by Mr. Williams as quoted in item 1, above.

Appendix C4. Summary of Petitioner's Counter-Affidavit, Rebutting Each of Respondents' Allegations Used to Support its Motion for Summary Judgment

SUMMARY OF ISSUES TAKEN WITH AFFIDAVIT OF MR. D. HERSHEY

¶ 4: Issue taken with scope of salaried employees' duties at ITT EOPD on basis that statement is generalized and misleading. Names of salaried employees provided by plaintiff that contradicts stated scope of salaried employees' duties as well as defining plaintiff's scope of work that was virtually all Generation III associated.

¶ 5: Issue taken with phraseology of this paragraph that leads one to believe ITT EOPD's loss of the Generation II portion of a 1990 contract award was a "surprise", when in fact it was common knowledge that ITT EOPD's generation II product was not competitive.

¶ 8: "reducing expenses by implementing a reduction in force among the salaried workforce" is impermissible per ADEA

since salary tied to tenure and tenure tied to age. Plaintiff contends he was, in fact, singled out for this and reasons of age.

¶ 9: Plaintiff's affidavit states he believes he was singled out for layoff because of his salary and because of his age; he further contends that ITT treated younger employees more favorably.

¶ 10: Plaintiff's official letter of termination stated reason as "result of the Generation II curtailment". No other reason ever provided to plaintiff by any ITT employee or manager. Defendants' now starting to introduce "other" reasons and the courts have ruled this as evidence of pretext. Plaintiff states he was the most qualified to perform the specific duties assigned to him at time of his termination.

¶ 11, 12: Conflicts in Mr. Hershey's

affidavit between Item 4 and Item 11. In the former he states salaried employees were not assigned to a specific product line, while in the latter he names a specific salaried employee, Mr. R. Stull as "Supervisor, in the Generation II area". Moreover, it is clear based upon defendants' own admissions that no rationale was considered for the company's action in laying off plaintiff v. other, non-protected employees, further supporting the fact that they were treated more favorably.

¶ 14: ITT's use of statistical approach in deciding "mix" of layoffs vs. plaintiff's tenure-associated salary that was double the average of those terminated designed to make company "look good", but at same time plaintiff's tenure-associated salary, more than double the average salary of laid off

group, indicates he was singled out for this reason.

¶ 16: Conflicts in Mr. Hershey's affidavit among Items 4, 11 and this paragraph. In Item 4 he states salaried employees were not assigned to a specific product line, while in Items 11 and 16 he names a specific salaried employee, Mr. R. Stull as "Supervisor, in the Generation II area".

¶ 17, 18: Defendants' state, or at least strongly imply, that since the overall statistics relating to its reduction in force termination "look-good", the specific acts of discrimination against plaintiff brought by the corporation with respect to the 22-person department in which he worked were irrelevant. Plaintiff contends that discrimination is discrimination, no matter how well a corporation may look from an overall

statistical standpoint.

¶ 19: Plaintiff, although named a "manager" in reality was assigned specific duties and these duties were taken away from him and given to at least three younger, non-protected employees in violation of the ADEA.

¶ 20: While heretofore never admitting in response to discovery that L. Holder and R. Comer "picked up" plaintiff's duties, defendant now admits this, but now also states that some older personnel also "picked up" some of plaintiff's duties. In addition to raising questions of credibility, plaintiff states none of the latter-named individuals knew anything about plaintiff's specific duties and that these vacillating positions of defendants go to the issue of pretext. Defendant's statements of comparative performance are challenged by

plaintiff on the basis that his performance rating of "Results at Standard", while meeting reasonable expectations, was deliberately distorted so that the company "looked-good" in its termination of plaintiff.

¶ 21: Plaintiff takes issue with Mr. Hershey's oversimplified analogy that limits his statistics to "grade 17 or over employees instead of overall department in which plaintiff worked. Taking the work of anyone protected by the ADEA and reassigning it among multiple lower level non-protected employees is just as discriminatory an act as replacing an older person with a younger person.

¶ 22: Inaccurate description of ITT's performance rating system provided by Mr. Hershey indicative of pretext.

¶ 23: Plaintiff's official performance rating, although rated at "4", "Results at Standard", was disputed in writing by plaintiff as deliberately underrated in "anticipation of some future event". Never officially answered by ITT.

¶ 24: Plaintiff takes issue with references to "adequate employee" and "performance problems" of Mr. Hershey's, provides details rebutting these allegations as well as stating that his official written notice of termination never mentioned any of these "negatives". Goes also to the issue of pretext.

¶ 25. Distorted description of plaintiff's four-year old performance rating by; issues raised on competence of evaluator as well as circumstances surrounding his departure from ITT, and, again as to the introduction of "new" reasons, other than the official one, for

plaintiff's termination.

¶ 26: Issue taken with affiant's selective editing of a six year old performance review, omitting significant accomplishments. Issue again taken with introduction of "new" reasons, other than the official one, for plaintiff's termination.

¶ 27: Objections to false statements by Mr. Hershey with regard to plaintiff's 1979 performance appraisal that was rated at "2", "Results Above Standard". Alludes to comments for which no mention was made in this document.

¶ 28: Issue taken with oversimplified description of notification to plaintiff of his termination.

¶ 29: Issue taken with Mr. Hershey's denial that age had anything to do with the business decision to eliminate his position and lay him off during our

salaried workforce reduction and state that the decision was age-related, made by Mr. Williams solely on the basis of age and age-related/tenure-associated salary and benefits I had or would accrue, and made in favor of younger personnel contrary to the age discrimination laws.

¶ 30: Issue taken with false statement made by affiant.

¶ 31: Distorted and grossly incorrect excerpt of Mr. Hershey's summary of a meeting in 1981 while plaintiff was employed at ITT in New Jersey, said meeting involving plaintiff's then supervisor.

Again, in the same excerpt of Mr. Hershey's that is referenced in connection with an ITT allegation in its memorandum: "Thus, the plaintiff requested that ITT consider him for other

opportunities within the company". In Mr. Hershey's own affidavit, ¶ 31, and its referenced Exhibit 9, on the 2nd page, last line of Exhibit 9, shows that Mr. Eder's supervisor clearly stated "In response to our questions if he desired to pursue opportunities elsewhere in ITT, his response was no."

Once again, in item 31 of Mr. Hershey's affidavit, a false statement is made that "Mr. Eder accused Larry Roberts and Jack Hare of setting him up to be terminated because of his age". Review of the letter that has been misquoted by Mr. Hershey will show that no names were given in the letter, and that the letter requested ITT Corporate "review my situation", as well as affirming my "allegiance to the Corporation". This requested review never took place.

Lastly, in item 31 of Mr.

Hershey's affidavit, he states "Mr. Eder has accused Bob Williams of laying him off because of his age". Section 2, under Item 31 of plaintiff's affidavit corrects this misleading phraseology.

¶ 32: Issue taken regarding plaintiff's last performance rating of "Results at Standard on basis of his rebuttal of April, 1990 that was never evaluated by defendants. Issue taken on distortion of plaintiff's prior performance ratings.

¶ 33: Issues taken with disparity between affiant's statements and exhibits proffered to support them. Issue taken with context of affiant's statement indicating essentially that the company's kindness drove it to retain plaintiff on a new nearly One Billion Dollar procurement by the Defense Department. Issue taken with affiant's silence regarding company president's promises to

plaintiff regarding plaintiff's employment.

¶ 34: Issue taken with regard to affiant's implication that an oral contract is not valid. Plaintiff states that when one has no written contract, the only other means to solidify a contractual relationship is orally.

¶ 35, 36, 37, 38: Objection to affiant's introduction, in support of the company's alleged "employment-at-will" policy, of an "Administrative Practice" not promulgated to Grade 18 or below salaried personnel. Plaintiff takes issue with affiant attempting to use Policies and Standard Practices, in one case as not contractual or binding and in the other case as the opposite.

¶ 39: Plaintiff takes issue with allegation of affiant that no discrimination has occurred.

¶ 40: Plaintiff takes issue with affiant's statement that "the company is sensitive to its long-service employees ..."

¶ 41: Plaintiff maintains that overall company discrimination-related statistics are irrelevant and that the real issue in this lawsuit is his treatment by the company in relation to his specific position in the 22-person department in which he worked and in the more favorable treatment afforded other non-protected employees in the same department. Also takes issue with discriminatory acts taken by the same department after his termination.

¶ 42: Issue taken with irrelevance of a 1992 layoff to plaintiff's 1990 layoff.

¶ 43: Issue taken with irrelevance of a 1993 layoff to plaintiff's 1990 layoff.

¶ 44, 45, 46: Agreement when given to plaintiff was presented in context of a "Patent Disclosure Agreement" and not a general confidentiality agreement as alleged by Mr. Hershey in ¶45. In ¶44, Mr. Hershey states "the policy is designed to "prevent the misappropriation of company information" and that "Employees who violate the company's policies are subject to discipline up to and including discharge." In reality, the only penalties stated in ITT EOPD policy are under ¶ 8.0 that states: "willful, witting disclosure, or disclosure through gross negligence, of ITT Proprietary information to unauthorized persons by an ITT employee will be considered sufficient cause for disciplinary action." Plaintiff denies any disclosure at all to unauthorized persons. Although not prohibited by

above policy, if removal of 2 documents is at issue, plaintiff removed them after his termination, and even if he removed them prior to his termination, which he did not, he had authorization to use them at home and cites Exhibits proving this, other employees of ITT EOPD had done the same, and none of these employees have been penalized to this day. One document (Exhibit 138) had been given to plaintiff by another employee (Ms. L. Holder), the other by Mr. J. Peters as delegate for Mr. R. Williams with no special precautions. Plaintiff states that all information contained in the documents is obsolete. Plaintiff believes these charges are further evidence of pretext.

SUMMARY OF ISSUES TAKEN WITH AFFIDAVIT OF MR. R. WILLIAMS

¶ 1. Plaintiff rounds out Mr. Williams' statement of his credentials by stating

that sometime in the early 1980s Mr. Williams was relieved from his position as Director of Marketing by the then President and General Manager of ITT EOPD, Mr. Mike Toohig, owing to unsatisfactory performance.

¶ 3: Issue taken with scope of salaried employees' duties at ITT EOPD on basis that statement is generalized and misleading. Names of salaried employees provided by plaintiff that contradicts stated scope of salaried employees' duties as well as defining plaintiff's scope of work that was virtually all Generation III associated.

¶ 5: Plaintiff rounds out Mr. Williams' statement of his credentials by stating that sometime in the early 1980s Mr. Williams was relieved from his position as Director of Marketing by the then President and General Manager of ITT

EOPD, Mr. Mike Toohig, owing to unsatisfactory performance.

¶ 6: Issue taken with context of affiant's statement indicating essentially that the company's kindness drove it to retain plaintiff on a new nearly One Billion Dollar procurement by the Defense Department. In reality the company desperately needed plaintiff's expertise in the field of Logistics Engineering and Management. Issue taken with affiant's use of term "manager" and evidence offered to refute this.

¶ 7: Issue taken with Mr. Williams' silence regarding his direction that "we will be a "lean and mean" organization; everyone would work as an individual". Issues taken with respect to downplaying scope and complexity of plaintiff's duties. Issue taken with affiant's denial of verbal promise he made to

plaintiff of job security.

¶ 10 and 11: Numerous issues taken with affiant's downplaying of scope of plaintiff's work and the outstanding success of plaintiff's U.S. Commercial Sales program and plaintiff's personal achievements that increased sales over tenfold in less than 3 years; affiant also fails to indicate the role of U.S. Commercial Sales in the company's business planning as stated publicly by the now President and General Manager on television and in the press in March and/or April, 1993.

¶ 12, 13, 14: Issues taken with affiant's failure to indicate that L. Holder's takeover of MARCOM (advertising) had been planned since 1988; issue taken with affiant's attempt to include plaintiff in the "planned" or "programmed" takeover of his duties in

advertising by L. Holder; issue taken with the exaggeration of L. Holder's capabilities and EEOC Investigator's statement offered as part of plaintiff's rebuttal that affirms plaintiff's evaluation that L. Holder performed coordinating/secretarial/editing/"go-fer" duties. Issue again taken with affiant's failure to honestly and in good faith indicate that plaintiff's performance in the field of advertising was excellent as he himself indicated in above meeting and in other documentation: "you do well in it".

¶ 15: Issue taken with exaggeration of Mr. Woodford's capacities in the field of logistics.

¶ 16: Issue taken with affiant's failure to indicate specific scope of Mr. Woodford's duties.

¶ 17: Issue taken with understatement of Mr. Kempster's originally planned duties that involved takeover of plaintiff's duties in three specific areas, but had to be changed as a result of ITT EOPD's need to terminate its Quality Assurance Director.

¶ 18: Issue taken with affiant's oversimplified/ glossing over the true reasons for hiring Mr. Comer - to take over still another portion of plaintiff's duties, U.S. Commercial Sales and Warranty Repair Operations.

¶ 19: Issue taken with affiant's downplaying of plaintiff's accomplishments in Warranty Repair Area that contradicts his advice to plaintiff in December, 1989, ignores his significant accomplishments in creating this new facility and in training its personnel.

¶ 20: Issue taken with phraseology of this paragraph that leads one to believe ITT EOPD's loss of the Generation II portion of a 1990 contract award was a "surprise", when in fact it was common knowledge that ITT EOPD's generation II product was not competitive

¶ 21, 22, 23, 24, 25, 26: Numerous issues taken with gross understatements made to support changes in reason for plaintiff's termination. Plaintiff reiterates his position was as a contributing "individual" per Mr. Williams' direction rather than "an unnecessary layer of management"; that the organizational charts do not show all tasks of plaintiff's; objects to the indication by affiant here and in replies to interrogatories that no form of work redistribution on the basis of seniority was given in the matter of plaintiff's

termination; fails to indicate Mr. Comer's subsequent termination for poor performance and that younger employees were treated more favorably.

¶ 27, 28, 29: Issues taken with affiant's self-serving and disingenuous statement designed to downplay plaintiff's performance and that the reasons now proffered by affiant are not what he was officially told in his written letter of termination.

¶ 30: Unable to comment because this paragraph is missing.

¶ 31: Plaintiff observes that three protected personnel are now missing from Mr. Williams' organization chart and another has been advised he will soon be terminated, as well as having been treated unfairly in the matter of his salary vs. his younger, non-protected co-worker's salary.

¶ 33: Issue taken on affiant's attempt to slight the fact that plaintiff's work involved virtually all Generation III products, despite the fact that he was terminated as a result of "Generation II curtailment', and that the other, younger, non-protected employees treated more favorably did in fact have significant Generation II responsibilities.

¶ 34: Refers to plaintiff's statements regarding individual ITT employee affidavits contained in subsequent sections of this affidavit.

¶ 35; Issues taken with alleged "opportunity to travel" and plaintiff discusses preference given to two younger employees named in his complaint long before the date the decision was made to terminate him ("May 15, 1990"). assigned his work

¶ 36: Issue taken with affiant's statement that "As Mr. Eder did not possess the necessary user military experience, he was not qualified for this position", and issue taken in that plaintiff was never even considered for position given to younger employee after plaintiff's termination despite plaintiff's ongoing requests for reinstatement.

¶ 37: Issue taken with affiant's misinterpretation of company's written policy.

¶ 38: Issue taken with affiant's failure to acknowledge specific promise of job security in January, 1988 and with affiant's statement that he had o authority to make promise.

¶ 39: Issue taken with affiant's denial of disparaging comments to plaintiff.

SUMMARY OF ISSUES TAKEN WITH AFFIDAVIT

OF L. HOLDER

¶ 4, 5, 8, 9, 10: Issue taken based upon affiant's contradictory statements in items 9 and 10 of affidavit; issue taken with affiant's over estimation of skills and plaintiff's provides details to support his affidavit.

¶ 7: Issue taken with affiant's statements that "our work encompassed all of EOPD's products which included Gen. (Generation) II and Gen. III night vision image intensifiers." and details provided to contradict these statements.

¶ 12: Issue taken with affiant's statement that she does not believe my termination had anything to do with my age on basis that affiant was in no position to know the facts of her allegation and that given the same phraseology of all affidavits, affiant is obviously parroting the company "party-

line" in the matter of plaintiff's termination.

SUMMARY OF ISSUES TAKEN WITH AFFIDAVIT OF J. PETERS

¶ 6, 7: Issue taken with statements regarding Mr. Comer's performance on basis that the only performance review discussed was for a six-month interval in 1989 when he was newly hired, and affiant fails to mention that Mr. Comer was terminated in 1991 owing to poor performance; finally that Mr. Peters does not amplify his reference to his discussion with Mr. Williams about Mr. Comer "prior to the layoff of Jim Eder".

¶ 10: Plaintiff takes issue with this statement of affiant on the same basis as in Item 12 of L. Holder's affidavit.

SUMMARY OF ISSUES TAKEN WITH AFFIDAVIT OF D. WOODFORD

¶ 3, 4, 5: Issue taken with affiant's silence regarding plaintiff's training of

him in the field of Logistics Engineering, the oversimplified description of this discipline; that affiant and plaintiff "sharing" responsibilities, and with affiant's statement implying that any logistics analysis work was equally divided between Generation II and Generation III products.

¶ 10: Plaintiff denies that affiant ever directed work of employees in graphics of technical writing.

¶ 11, 12: Plaintiff disputed allegation of affiant that "picking up" plaintiff's work had no significant impact.

¶ 13: Plaintiff denies incident; points out inconsistency between this statement and the affidavit he gave to the EEOC; challenges the credibility of alleged statement.

¶ 14: Plaintiff contends statement is

irrelevant because affiant was in no position to know this and it is obvious that the company has chosen, as it did with the EEOC investigator, to have each affiant intertwine this remark throughout its system of affidavits.

SUMMARY OF ISSUES TAKEN WITH AFFIDAVIT OF J. LANGDON

Issues is taken with the entire contents of affiant's statement on the basis that her low skill level, non-technical editor/typist background makes her unqualified to pronounce judgments on technical skills required in the field of logistics engineering, or any other technical field; not qualified in personnel management disciplines; not qualified to judge or comment on corporate philosophy. Further, her statement of the week of April 4, 1993: "It would be nice to have Mr. Eder back"

contradicts the contrived, "party-line" theme taken by defendants' in preparation of its supporting affidavits.